etc., Co., supra, that the decision in the Michigan Case is conclusive upon us on the question of the constitutionality of the statute under consideration, and therefore the judgment of the State Corporation Commission complained of must be affirmed.

Note.

When the constitutionality of the Churchman act was first attacked in the case of Com. *v.* Baltimore & Ohio R. Co., decided in the corporation court for the city of Staunton, the Register for August, 1906, published this decision, together with Lake Shore & M. S. Ry. Co., on which Judge Holt based his ruling holding the act unconstitutional, and in the principal case the court held this decision by the supreme court of the United States conclusive and binding on them.

HULVEY *et al. v.* ROBERTS *et al.*

Nov. 22, 1906.

[55 S. E. 585.]

1. **Intoxicating Liquors—Grant of License—Determination—Right of Appeal.**—In view of the course of legislation (Code 1849, pp. 443, 444, c. 96, § 3; Code 1873, c. 178, § 2; Acts 1879-80, p. 147, c. 155; Acts 1883-84, p. 605, c. 450), and the judicial interpretation thereof, the Legislature, in the exercise of the police power, may deny the right of appeal in a case involving the licensing of the sale of intoxicating liquors.

2. **Courts—Appellate Courts—Grounds of Jurisdiction—Constitutional Questions—Legislative Enactment.**—Const., art. 6, § 88 [Va. Code 1904, p. ccxxx] provides that, "subject to such reasonable rules as may be prescribed by law as to the course of appeal, * * * the granting or refusing of appeal and the proceedings therein," the Supreme Court "shall, by virtue of this Constitution, have appellate jurisdiction in all cases involving the constitutionality of a law." Code 1904, § 586a, provides that, in judging of an election as to the licensing of the sale of liquor, the circuit court shall decide the question "on the Constitution and laws, * * * and the judgment of said court shall be final." Held, that since section 88 does not operate ex proprio vigore to confer appellate jurisdiction, the judgment of the circuit court in determining the validity of the election is final, though the constitutionality of Code 1904, § 62, touching the qualification of voters at such elections, is involved.

Error to Circuit Court, Augusta County.

Proceedings by one Hulvey and others against one Roberts and others to determine the validity of an election forbidding the licensing of the sale of intoxicating liquors. From a judgment declaring the election valid, Hulvey and others bring error. Writ dismissed.

Patrick & Gordon and *Hulst Glenn,* for appellants.
J. M. Perry, Quarles & Pilson and *H. H. Blease,* for appellees.

WHITTLE, J. The writ of error in this case was allowed by one of the judges of this court to the judgment of the circuit court of Augusta county, declaring valid an election under chapter 25, Va. Code 1904, against licensing the sale of intoxicating liquors in Basic City. We are met at the threshold of the inquiry by the question of jurisdiction.

Section 586a declares that, "in judging of such election and return, the court shall proceed on the merits thereof, and decide the same on the Constitution and laws, and according to the right of the case, and enter such order as will carry its decision into full and complete effect. And the judgment of said court shall be final."

In Lester *v.* Price, 83 Va. 648, at page 652, 3 S. E. 529, at page 530, it is said: "From a very early period—certainly as early as 1666—the subject [licensing the sale of liquor] was committed to the sole judgment and discretion of the county courts, and their discretion to grant or refuse licenses could not be interfered with by any higher courts. In the earlier statutes we find the language conferring such absolute discretion quite specific, as for instance: 'And, if such petition appear reasonable, such court is hereby authorized, and may, if they think fit, grant the petitioner a license,' etc., or 'by their discretion, shall judge whether it is convenient to suffer such a house to be set up,' etc." See Va. Code 1849, pp. 443, 444, c. 96, § 3; and Acts 1669-70, pp. 22, 239.

This policy seems to have been pursued and to have remained unchallenged until the case of Ex parte Yeager, 11 Grat. 655 (decided in 1854) arose. In that case, Judge Daniel, who delivered the opinion of the court, reviews the history of legislation in regard to granting licenses, in light of the earlier decisions, and holds that the act (Code 1849, p. 443, c. 96, § 3) "vests in the county courts a discretion to grant or refuse a license to keep a tavern; in the exercise of which discretion they cannot be controlled by the circuit courts, either by mandamus, writ of error, or certiorari."

So, in French *v.* Noel, 22 Grat. 454, in prohibition, the same doctrine was reaffirmed; and it was said that the action of the circuit court allowing an appeal to the order of the county court in such case was coram non judice.

In Leighton *v.* Maury, 76 Va. 865, the court construed the act of March 3, 1880 (Acts 1879-80, p. 147, c. 155), and held that it was the purpose of that enactment to depart from the policy of former statutes as construed in Yeager's Case, supra. In that case the court observes: "That statute says the county court

'shall grant the license' if the applicant brings himself within the requirements, and the circuit court 'may grant the license' means the circuit court shall have the jurisdiction to do so, and must do so, if the applicant brings himself within the requirements." The act was declared to be mandatory, and the right of appeal to the circuit court absolute.

In Thon *v.* Commonwealth, 31 Grat. (Va.) 887, will be found a comprehensive note on the subject of intoxicating liquors in general, and, at page 895 of 31 Grat., it is said: "In Ailstock *v.* Page, 77 Va. 386, the court expressly overrules Leighton *v.* Maury, 76 Va. 875, so far as that case decides that the contestant is such a party in interest that he is entitled to an appeal or writ of error.

"In Ex parte Lester, 77 Va. 663, it was held that, under the act of 1882, the applicant may appeal to the circuit court or he may, upon bill of exceptions taken at the trial, apply to the circuit court for a writ of error and supersedeas, and, if the circuit court also erroneously refused the license, its decision is reviewable by the Supreme Court upon appeal, or writ of error and supersedeas, as in other cases. The applicant is a party directly in interest in the decision refusing the license, and comes within the letter of Code 1873, c. 178, § 2, but this is not true of the contestant who cannot appeal. See, also, Haddox *v.* County of Clarke, 79 Va. 677." It is also said that, "under the Acts 1883-84, p. 605, c. 450, application for license to retail liquor must be made to the county court, and either applicant or defendant may appeal of right from the decision to the circuit court where the application is heard de novo, and no appeal lies to the decision of the latter court."

The case of Lester *v.* Price, supra, construed the act of 1883-84. It is there held that no appeal lies to the decision of the circuit court, and the writ of error and supersedeas was dismissed as having been improvidently awarded.

The court, as at present constituted, has, on several occasions, refused to grant writs of error in this class of cases, so that the doctrine of Lester *v.* Price represents the present state of the law on the subject.

In the recent case of the City of Danville *v.* Hatcher, 101 Va. 523, 44 S. E. 723, this court had occasion to consider the question of state control of the traffic in intoxicating liquors. It was there held that the sale of liquor is not one of the privileges or immunities of citizenship guarantied by the Constitution of the United States, or the fourteenth amendment thereof; that the regulation of the subject is completely within the police power of the state; that the sale of liquor may be entirely prohibited, or regulated in any manner the Legislature may deem wise, without supervision or control by the courts.

This outline of the legislative and judicial policy of the state with respect to the sale of intoxicating liquors shows conclusively that the question of the power of the Legislature to deny a right of appeal in that class of cases is no longer debatable.

It is sought, however, in the case under review, to maintain the jurisdiction of this court on the theory that the constitutionality of section 62 of the Code of 1904, in regard to the qualification of persons voting in the local option election, is drawn in question. That suggestion is answered by the fact that the Legislature has seen proper to submit that question, as well as all other questions affecting the validity of the election, to the final arbitrament of the circuit court. Indeed, in this instance, the duty of deciding the case "on the Constitution and laws" is expressly devolved upon that tribunal. The pretension that the right of appeal exists merely because the constitutionality of a law is involved proceeds upon the erroneous theory that article 6 of the Constitution [Va. Code 1904, p. ccxxx], by its own force and vigor, invests this court with jurisdiction in all such cases. On the contrary, it has been repeatedly held by this court that the provision of article 6, § 2, Constitution of 1869, does not, proprio vigore, confer jurisdiction upon the court, but that it exercises jurisdiction within constitutional limitations by virtue of statutes passed in furtherance of that provision.

Thus in Prison Ass'n *v.* Ashby, 93 Va. 667, at page 671, 25 S. E. 893, at page 894, the court says: "Section 2 of article 6 of the Constitution providing that this court shall have appellate jurisdiction only, except in cases of habeas corpus, mandamus, and prohibition, does not, proprio vigore, confer jurisdiction upon it. The Constitution does not prescribe any case in which the appellate powers of this court shall be exercised, nor declare that it shall exercise original jurisdiction in all cases of habeas corpus, mandamus, and prohibition." The learned judge concludes that the Constitution invests the court with capacity to receive jurisdiction "in the event the Legislature sees fit to confer it, but does not, of itself, confer the jurisdiction." Citing Barnett *v.* Meredith, Judge, 10 Grat. 650; Page *v.* Clopton, 30 Grat. 415, 417; Gresham *v.* Ewell, 84 Va. 784, 6 S. E. 134; Price *v.* Smith, 93 Va. 14, 24 S. E. 474.

In Flanary *v.* Kane, 102 Va. 547, 565, 46 S. E. 312, 681, the same construction is placed on section 88 of article 6 of the present Constitution [Va. Code 1904, p. ccxxx] which follows the conclusion reached by this court in Andes *v.* Showalter, (no opinion filed) where, on September 10, 1903, an appeal from a decree of the circuit court of Augusta county was dismissed for want of jurisdiction, it appearing that less than $500, exclusive of costs, was involved, the court being of opinion "that the

Constitution of the state does not operate proprio vigore to change the jurisdiction of this court in matters merely pecuniary, and that, until the Legislature shall act upon the subject the minimum of jurisdiction of this court remains as fixed by section 3455 of the Code of 1877 [Va. Code 1904, p. 1837]."

We must assume that the convention which framed the present Constitution were cognizant of the interpretation placed by the courts on corresponding provisions of former constitutions with respect to the jurisdiction of this court, and, if it had been their purpose to change the course of judicial decision on the subject, it would have been manifested in unmistakable language.

If a constitutional provision succeeds another on the same subject, and the former plainly required legislative action to become effective, while the latter is ambiguous on that subject, the courts will hold that the latter requires legislative action also. Newport News *v.* Woodward, 104 Va. 58, 51 S. E. 193.

The reverse of this is true with regard to article 6, § 88, and the phraseology there employed accentuates the necessity for legislative action.

The conclusion of the whole matter "is that, in the exercise of the state's police power, the dominion of the Legislature over the subject of intoxicating liquors is absolute, and, when it so ordains, the judgments of the tribunals upon which it elects to confer jurisdiction in that matter are not amenable to review by any other court.

We are, therefore, of opinion that this writ of error was improvidently awarded, and must be dismissed.

Note.

In Michigan the finding and determination of the board of supervisors as to the sufficiency of the petition for a local option election, and as to the requisite number of electors having signed the same, is final and conclusive and not subject to review. Thomas *v.* Abbott, 105 Mich. 687, 63 N. W. 984; Covert *v.* Munson, 93 Mich. 603, 53 N. W. 733; Friesner *v.* Charlotte, 91 Mich. 504, 52 N. W. 18.

PUCKETT *v.* MULLINS.

Dec. 6, 1906.

[55 S. E. 676.]

1. **Witnesses—Transaction with Deceased Person—Competency.**—Plaintiff gave notice to take depositions, whereupon defendant, who was present with his counsel, was called to testify on plaintiff's behalf as an adverse party, and his deposition was accordingly taken. On a subsequent day plaintiff was introduced as a witness in his own behalf and pending his examination in chief defendant died.